# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1942

## No. 524

MILLER LAND AND LIVESTOCK CO.,
*Petitioner and Appellant below,*

vs.

FRANK BOGART,
*Respondent and Appellee below.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit**
**and**
**BRIEF IN SUPPORT THEREOF.**

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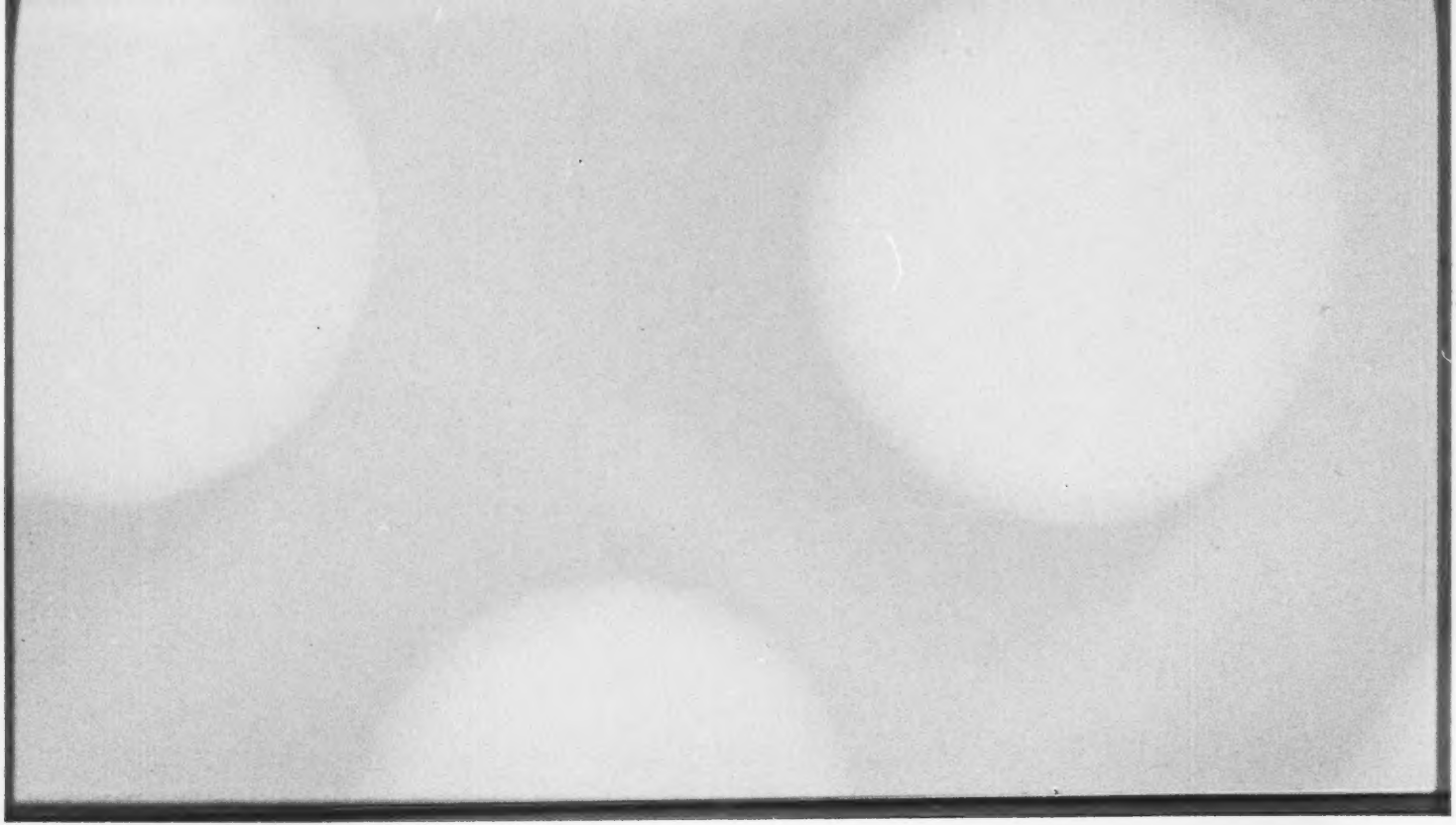

## Subject Index



## Table of Authorities Cited

### Cases



### Statutes



### Text Books and Encyclopedias

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OF THE
# United States

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MILLER LAND AND LIVESTOCK CO.,
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## PETITION FOR WRIT OF CERTIORARI
## to the United States Circuit Court of Appeals for the Ninth Circuit.

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*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Your Petitioner respectfully shows:

### I.

### SUMMARY STATEMENT OF MATTER INVOLVED.

1. In a proceeding under Section 75 a to r of the National Bankruptcy Act, Miller Land and Livestock

Co., a farming corporation, petitioned and cross-petitioned the District Court, pursuant to Subdivision k of that Act, for a reduction of the rate of interest on a $150,000.00 claim secured by several first real estate mortgages on land worth $800,000.00. The issues arise on the pleadings.

2. Summarized, the allegations of the Debtor petitions and cross-petitions (Pages 54 to 57, Paragraphs 6, 7, 8, 9 and 10, and Pages 62 to 65, Inclusive, of the Transcript of Record), show that these proceedings started April 13, 1938. (Pages 52 and 53, Paragraph 2, Transcript of Record.) That at the time this part of the controversy arose the Debtor was engaged in negotiating settlements with its secured creditors, including Abbott Co., *and that all of said creditors, except Frank Bogart, had waived claims for interest and had discounted the face of their claims in various amounts.* (Page 55, Paragraph 6 of Transcript of Record.)

3. The petitions show that to increase the productivity and earnings of the land so that Debtor might sooner pay its creditors, that it had (Page 62, Paragraph III) since the proceeding started, increased the value of the mortgaged security held by Mr. Bogart in excess of $100,000.00. Such improvements consisted of "constructing and repairing ditches, fences, building and storage facilities, roads, bridges, corrals and other improvements". (Paragraph 8, Page 55 of Transcript of Record.) That Debtor at that time was paying various and numerous secured claims. Such settlements and payments were beneficial to the Debtor and particularly to its unsecured creditors. (Paragraph 6,

Page 54 of Transcript of Record.) ($200,000.00 of unsecured claims, Paragraph IV, Page 64 of Transcript of Record.) That due to such payments, including payments to Mr. Bogart, the amount of cash on hand was reduced. (Paragraph 6 above referred to.) In general it appears from the record that it was very desirable and necessary if Debtor was to be rehabilitated and the interests of the unsecured creditors protected, that money presently be used for increasing productivity and income. By so doing it would prevent forced and disastrous liquidation. That otherwise, one creditor, Mr. Bogart, would probably get the bulk of the assets worth $800,000.00 for his then claim of $180,000.00, and the unsecured claims, totaling $200,000.00 would get little or nothing. (Paragraphs III and IV, Pages 63 and 64, and Paragraphs V and VI, Page 68, Transcript of Record.)

4. That "Frank Bogart has not been and is not acting in good faith toward petitioner (the debtor and appellant herein) and other creditors, in that his actions demonstrate he would rather have the security he claims than the money due him. That by acquiring the security (admitted to be worth $800,000.00) he would make a large unearned and unjust profit at the expense of the debtor and the unsecured creditors, and that in an effort to bring about such a result he has maintained and contemplates maintaining a series of vexatious, harrassing and unfounded objections, petitions, motions and proceedings whereby he hinders debtor from refinancing, takes the time of its management and causes unnecessary expense to the debtor." (See Paragraph VI, Page 68 of Transcript of Record.)

5. That "considering the value of the security, the amount of the investment, the money market and all circumstances surrounding Mr. Bogart's claim, including the best interest of all concerned, it is just, equitable and right that the Court should modify the proposal and reduce the interest rate, etc." (Page 69, Paragraph VIII of Transcript of Record.)

6. Mr. Bogart, the appellee below, the respondent here, responding to the petition and cross-petition, objected upon the sole grounds (Page 73 of the Transcript of Record):

"1. That said petition does not state facts sufficient to warrant granting such relief.

"2. That the Court is without authority, power or jurisdiction to grant such relief."

7. No testimony was introduced, as no denial of the allegations was made and the allegations of the Debtor were and are to be taken as true.

8. On August 16, 1941, the District Judge ordered the interest rate reduced from 6% to 4%. (Page 74 of Transcript of Record.)

9. Mr. Bogart appealed to the Circuit Court, giving as his statement of points relied upon that:

"1. That the Court was without jurisdiction to reduce the rate of interest on the Bogart claim to four per cent, as it appears that the value of the property mortgaged as security for the payment of the claim is largely in excess of the indebtedness.

"2. That the petition for the reduction of the rate of interest does not state facts sufficient to authorize such reduction."

10. On July 21, 1942, the Ninth Circuit Court of Appeals by a two to one opinion reversed the order involved. The opinion is cited as *Bogart v. Miller Land and Livestock Co.,* 129 F. (2d) 772.

11. The opinion seemingly being based upon the grounds that the order of the District Court resulted in discrimination against Mr. Bogart in the matter of interest, the Debtor filed a petition for rehearing on the grounds that such issue had not been pled nor argued nor was involved, that the record on such issue was not before the Court. That what record there was on that point refuted it. Debtor also made application to have the record on the question of discrimination brought up alleging facts and the existence of a record below showing that if discrimination regarding interest rate was involved that such discrimination existed in favor of Mr. Bogart because he had received, and under the Court order would continue to receive a greater rate of interest than any other creditor. See petition for rehearing filed in Circuit Court.

12. The Ninth Circuit Court of Appeals on September 14, 1942, denied the petition for rehearing and in so doing made no mention of the application of Debtor for completing the record on the question of discrimination, which word appeared for the first time in the opinion of the Circuit Court.

13. The amount involved in this proceeding is approximately $12,000.00. Since the order the Debtor

has made payments according to its proposal, and about July 1, 1942, the Debtor, having been aided by having been relieved by the order of the District Court, at least temporarily, from a part of its financial burdens, paid Mr. Bogart everything he claimed, except the difference in interest of 2%. The main proceeding is at this time still pending. In refinancing the Farm Debtor, Mr. Bogart and the First Security Bank of Utah, N. A. of Ogden, Utah, about July 1, 1942, entered into an agreement whereby Mr. Bogart released his mortgages upon being paid the undisputed balance with interest according to the Court order, and he accepted the obligation of the bank up to $12,000.00 in place of his mortgages, payment being conditional upon it being finally determined that he is legally enentitled to the 2% difference in interest here involved.

14. To inform the Court it is also a fact that Debtor, since the order of the District Court was made, submitted a new proposal to its remaining creditors which was confirmed and has been carried out except as to one or two disputed claims involving relatively small amounts still in litigation. The modified proposal did not affect Mr. Bogart's claim, as it proposed to pay him whatever was found to be due him when this controversy is decided.

15. The statements in Paragraphs 13 and 14 do not appear in the record that was before the Ninth Circuit Court of Appeals and are alleged for the purpose of informing this Court in a general way of the present status of the main proceedings out of which this controversy arises. On September 15, 1942, pur-

suant to petition of Debtor the Circuit Court stayed the issuance of its mandate until November 1, 1942, and if a petition for a writ of certiorari be filed within that time with the Clerk of the Supreme Court a further stay until such petition was disposed of.

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## II.

### REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The writ should issue, because as appears by the Petition the Circuit Court of Appeals has:

1. Decided on important questions of general law in a way probably untenable, to-wit, held that District Court in a Farm Debtor proceeding has no power to reduce the interest rate on a secured claim.

2. Decided an important question of federal law which has not been, but should be, settled by this Court, to-wit, held that an order reducing interest rate on one claim was discrimination and outside the jurisdiction of the Court to make.

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, to-wit, decided this cause on an issue (discrimination) which was not raised by pleadings, nor briefed, nor covered by the record; assumed that discrimination existed and that on petition for rehearing showing that if discrimination existed it was in favor of and not against the claimant,

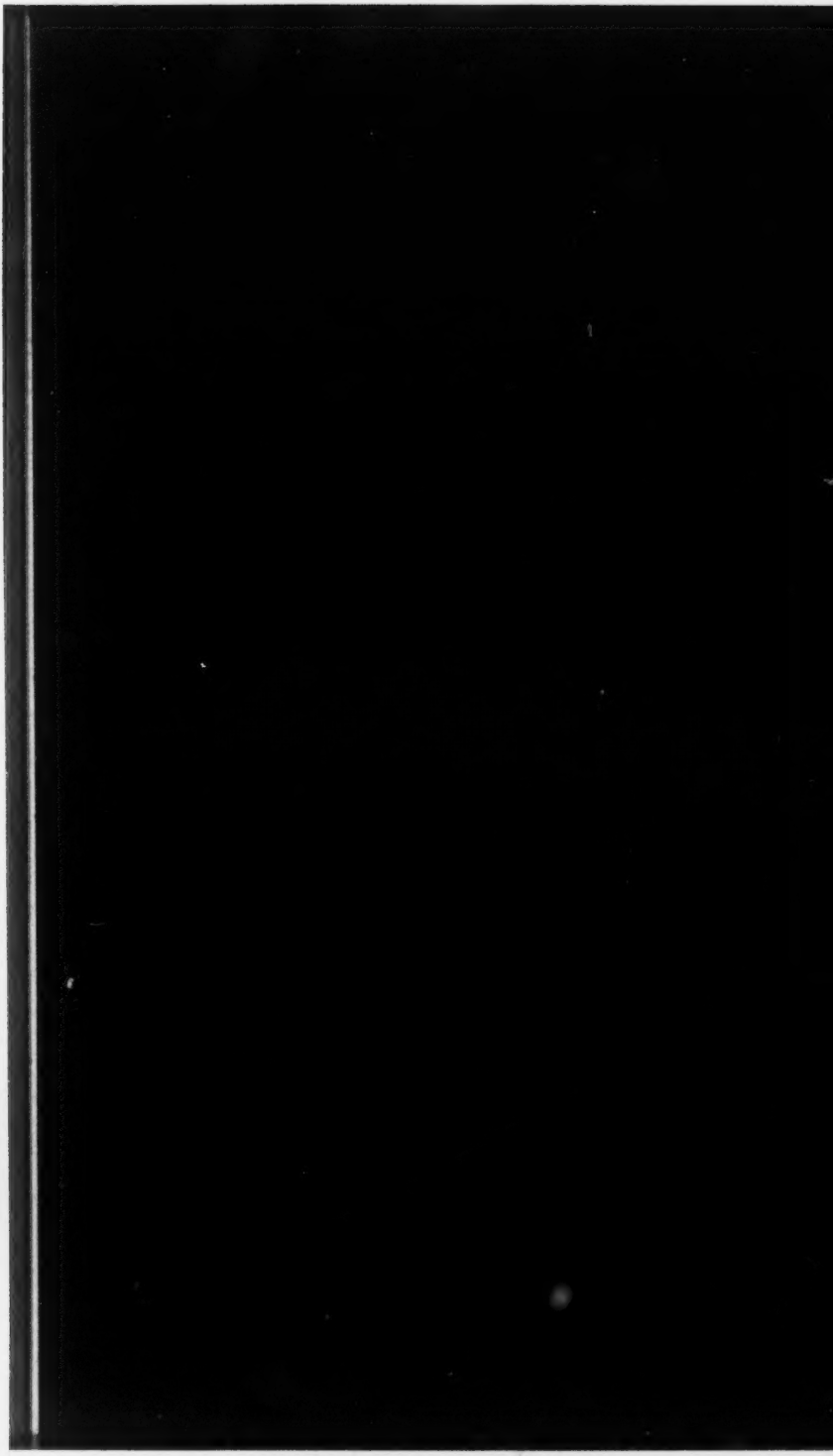
refused to permit the record to be completed to show such record fact.

4. Has held both ways on identical question. See *Cohen v. Elder,* 112 F. (2d) 967.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit requiring said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Court had in the case numbered and entitled on its docket, No. 9946, Frank Bogart, appellant, v. Miller Land and Livestock Company, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other relief as to this Court may deem proper.

Dated this 6th day of November, 1942.

C. T. BUSHA, JR.,
C. LIEBERT CRUM,
*Counsel for Petitioner.*



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MILLER LAND AND LIVESTOCK CO.,
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vs.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### OPINION BELOW.

The opinion of the Circuit Court is reported in 129 F. (2d) 772. (A note thereto sets out order of District Court Judge.)

## II.

### STATEMENT OF GROUNDS OF JURISDICTION.

1. The statutory provisions believed to sustain the jurisdiction of this Court are U. S. C. Title 28, Section 347, and Section 24, Subdivision c, of National Bankruptcy Act.

2. The statutes of the United States that are involved are Title 11, Section 203, Subdivisions k and l (Section 75, Subdivisions k and l of Bankruptcy Act) which, as far as is thought to be material, read as follows:

(From subsection l):

> "The Court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the Court, set the same aside, reinstate the case and modify the terms of the extension proposal."

(and from subsection k):

> "nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured."

3. The original issues involved arise on the pleading summarized and quoted from in the petition for the writ. In addition to some $12,000.00 it involves questions of general importance because it involves the jurisdiction of the Court to act in matters of importance to practically every party in a debtor or reorganization proceeding, viz.: the power of the Court to control interest rates. The question of the control

of interest in proceedings designed to assist in the rehabilitation or reorganization of a debtor is of great and often decisive importance. The power of the Court to adjust interest, when it should adjust interest and how it should adjust it are involved in the holding of the Circuit Court, who have construed this simple beneficial law in a manner that denies the benefit of its provisions to the petitioner and will stand in the way of all who seek to follow after. The total amount of interest in all such cases is involved.

We submit that it is untenable to hold, as the Circuit Court did, that:

a. Discrimination is involved (unless it be in favor of Mr. Bogart).

b. That the order of the District Court is inequitable.

The record does show that:

a. That all secured claimants, except Mr. Bogart, had waived all interest or more, nevertheless the Circuit Court holds that Mr. Bogart was discriminated against because the Court reduced the interest rate on his claim from 6% to 4%.

b. To assume that all interest rates must be equal otherwise discrimination is presumed is untenable in the absence of proof of the nature of the various claims or that they constitute a class or what the interest rates were.

c. When it was made to appear to the Circuit Court of Appeals that on the new issue they had created, the record was incomplete and exactly

opposite from the facts they assumed, they should have ordered the record on that issue brought up.

4. A case believed to sustain jurisdiction is as follows:

*Borchard v. California Bank,* 206 U. S. 311.

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## III.

### STATEMENT OF THE CASE.

This has already been done in petition for writ under Paragraph I, which for the sake of brevity and economy is hereby adopted and made a part of this brief.

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## IV.

### SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in holding that:

I. That the said order of the District Court should be reversed.

II. The Judge of the District Court had no jurisdiction to make the order.

III. The petition for rehearing and perfecting its record on the question of discrimination should be denied.

## V.

### ARGUMENT.

On specifications of error I and II the writer believes that the able dissenting opinion of Circuit Court Judge Garrecht in this case constitutes a more able argument on the true issues involved than counsel could make. Such argument already being in the record as part of the decision to be reviewed, it is deemed unnecessary to repeat it in this brief. Counsel feels that the majority opinion went off on a tangent, by-passed the true issues, misconstrued the allegations before it and created an issue that was not before it, nor had such issue been before the District Judge. What is material is the question of whether or not, a district court on a petition for reduction in interest rate is ousted of jurisdiction to grant such reduction because the security is greater in amount than the claim. To state it another way, is the contract right to future interest on an obligation that is amply secured a vested right that cannot be disturbed even though to reduce the interest would aid in rehabilitating the debtor, reduce the time within which all claims might be paid, and the creditor is acting in bad faith? These are constitutional questions of importance not only in a Farm Debtor proceeding but in reorganizations of all kinds, because the power to act in all stems from the same source.

## VI.

### ARGUMENT ON POINT III.

If for the sake of argument only we assume that the question of discrimination is involved, the majority opinion completely overruled the fact that (Page 55 of Transcript of Record) it is alleged (referring to secured creditors):

> "That all of said creditors have waived their claims for interest and have discounted the face of their claims for various amounts."

In the petition for rehearing, the debtor included an application for completing the record on the new point raised by the Circuit Court by showing the Court that the record on that point would show *that Mr. Bogart after and under the Court order would get a higher rate of interest than any other creditor.* (See Petition for Rehearing, Page 6, Paragraphs III, IV, V and IX.)

The majority decision of the Circuit Court being based upon a new issue not raised by the pleadings, nor covered by the record (except allegations that showed no discrimination against Mr. Bogart), should have ordered the record completed so that there would be a record on that point. However, the writer feels that it cannot be assumed that equality of interest rates between claims is necessarily equity. The record does show that there were all kinds of claims. There were large, small and medium in amount, there were secured claims of all sizes and nature. In some cases the value of its security was increasing; other security

was decreasing in value. (Page 54, Paragraph 6, of Transcript of Record.) Can it be said that a rigid rule must be laid down by this Court that a difference in interest cannot be allowed, and that the Court has no jurisdiction to change any one rate of interest downward? If such a principle be laid down, then the original proposal could have been attacked because it contained a provision regarding secured claims that,

> "unpaid balances to bear interest at the existing contract rate". (Page 3 of Transcript of Record.)

It does not appear what the existing contract rates on other claims were as compared to the rate on Mr. Bogart's claim, except that Abbott Co. were "attempting" to charge 9%. (Page 55 of Transcript of Record; also Page 12 of Petition for Rehearing.) But if it is proper for a court to *require the debtor to pay interest rates according to various contracts covering the entire legal range of rates of interest from no interest to the highest rate thus requiring discrimination between creditors how then can it be said that the court would lose jurisdiction, on equitable grounds, to change a rate of interest,* even though it is different from another claimant's rate of interest?

It is interesting to speculate on the true basis for interest but the writer at least cannot see justification for an equitable rule that a small claim, secured by depreciating security being used up to increase the value of land security must bear the same rate of interest as a well secured mortgage. Certainly many distinctions exist. One is a safe long term investment

of a relatively large sum. The other is an incident connected with a sale on credit of relatively perishable goods. The expenses of servicing a loan or credit in the case of a small loan or credit are greater in proportion to the amount involved. The risk is greater in the case of a credit sale of machinery than is incurred in a real estate mortgage for $150,000.00 on security worth $800,000.00 and which over more than twenty years had already paid $220,000.00 in interest alone. Surely such a prime investment proposition could be properly classified as such and the interest rate adjusted so that by increasing productivity and value all involved would receive their principal and a fair rate of interest sooner.

Unless the security is worth more than the debt no interest is ordinarily allowed on a claim in bankruptcy. There might be a surplus over all debts but any claim for interest of a secured debt after the security was exhausted would be only for a pro rate share of the surplus. (See 8 C. J. S. 1280.) Therefore the law regarding a change of interest rate is only useful to the debtor and his unsecured creditors where there is an excess of value of security over the debt it secures. Yet the Circuit Court holds that to reduce the interest rate on such over secured claim is "sacrificing him" that it "discriminates" against him.

Thus they say this "equity" is above the law and that the court has no "jurisdiction" to follow the law. On the allegations of the Petition the equities were and are with the debtor. See

*In re Chicago Reed & Furniture Co., Levin v. Johnson,* 7 F. (2d) 885.

Yet the Circuit Court found that the legal position of the creditor was such that it invoked equity on his behalf. The Circuit Court in searching for an analogy drew it from *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, but such analogy is not true because in that case persons were included in the plan who had no equity to protect. In the case at bar there were equities to protect; on this one claim alone $650,000.00 of equities to protect for the unsecured creditors and the debtor.

This application of the law by the Circuit Court changes the law in the same manner that the now discredited "good faith" being the equivalent of "able to pay all debts in full within three years" theory that arose in the lower courts changed it and prevented thousands from benefiting by the act. Unless the true construction is determined by this Court this decision of the Circuit Court will spread across the land and district judges will feel themselves bound to turn down justified petitions for reduction of interest rates to the detriment of debtors and their unsecured creditors.

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**SUMMARY.**

a. The order of the District Court should not have been reversed because it was fully justified by the law and the facts before the Court.

b. To hold, as the Circuit Court did, that the record showed discrimination is contrary to the undisputed record.

c. Equality of interest rate is not necessarily equity and every claim should be judged by its own circumstances. Discrimination, if an issue, must be proven not assumed.

d. Where the record shows that all other secured creditors had waived interest, an order reducing interest from 6% to 4% on the one remaining secured claim is not discrimination.

f. The issue of discrimination being raised by the Circuit Court for the first time, debtor's application to have the record completed on that point should have been allowed or the affidavit in support should be taken as true.

g. The right to control interest rates upon proper application is an important power of the Court and the discretion of the District Court in lowering the interest rate from 6% to 4% on a claim should not have been disturbed by the Circuit Court. The Court has this power as an attribute of equity where the conduct of a creditor shows bad faith. A court is not nor should it be helpless to use its discretion against a creditor in bad faith who by his actions seeks to take $800,000.00 worth of security for a debt of $150,000.00, thus protecting unsecured creditors and the debtor, as set out in the original petition.

h. That to construe the law as the Circuit Court did is to make that portion of the law unworkable.

i. That the issue is of great importance to many.

WHEREFORE your petitioner respectfully submits that the writ should issue in this cause and that on hearing the order of the District Court should be affirmed and order of the Circuit Court of Appeals herein reversed.

Dated this 6th day of November, 1942.

MILLER LAND AND LIVESTOCK CO.,
*Petitioner.*

By C. T. BUSHA, JR.,
C. LIEBERT CRUM,
*Counsel for Petitioner.*

(16)



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MILLER LAND AND LIVESTOCK CO.,
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# Brief for Respondent

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# Subject Index



# Table of Authorities Cited

## CASES



## STATUTES

# In The Supreme Court

OF THE

# United States

OCTOBER TERM, 1942

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## Brief for Respondent

**MISSTATEMENT OF FACTS IN PETITION AND BRIEF FOR PETITIONER.**

In the opinion of the lower court it is said:

"It is to be gathered from the record that approximately $200,000 of unsecured claims were approved in the proceeding. The precise amount of the secured debts, aside from that owing appellant, is not shown; but it does appear that there is at least one other secured claim, amounting to $9,300 and bearing interest at the rate of 9%." (129 Fed. (2d) 774).

On page 2 of the Petition it is stated that all secured creditors, except Frank Bogart, Respondent, "had waived claims for interest" and reference is made to page 55 of the record in support of this statement.

In the brief for petitioner, on page 11, it is said:

> "The record does show that:
>
> a. That all secured claimants, except Mr. Bogart, had waived all interest" etc.

In the brief for petitioner, on page 14, there is a quotation from page 55 of the record as follows:

> "That all of said creditors have waived their claims for interest and have discounted the face of their claims for various amounts."

It is stated that in this quotation the words "said creditors" referred to the "secured creditors", and that in the majority opinion of the lower court this fact was completely "overruled", apparently intending to state that it was overlooked.

That the words "said creditors" did not refer to Abbott & Company clearly appears from the prayer of the "Return to Order to Show Cause", on page 57 of the record, in which the petitioner prays that not only the interest on the Bogart claim be reduced, but also the interest on the Abbott & Company claim be reduced. Furthermore, in the affidavit of the attorney for the petitioner, made a part of the record (p. 115) it is stated that at the time of the petition for the reduction of interest on the Bogart claim there were several secured claims which "had not been disposed of, among which was the claim

of Abbott & Company for $9807.15". It further appears from the affidavit that the Abbott & Company claim was settled for an amount which included interest "to below four per cent", after the making of the order reducing the interest on the Bogart claim.

It is immaterial, however, whether there had been a settlement of the Abbott & Company claim at the time of the making of the order in question, as the record shows that at the time of the making of the order there were approximately $200,000 of unsecured claims which had been approved in the proceeding (R. 64). By the proposal made, the acceptance of same by the creditors and the confirmation by the court, the petitioner had agreed to pay the unsecured creditors 5% interest on their claims.

**SUBDIVISION (k) OF SECTION 75 OF THE BANKRUPTCY ACT ONLY AUTHORIZES REDUCTION OF FUTURE RATE OF INTEREST ON ALL DEBTS.**

The language of the proviso in Subdivision (k) of Section 75 of the Bankruptcy Act is that:

> "nothing herein shall prevent the reduction of the future rate of interest on *all debts* of the debtor, whether secured or unsecured." (Italics ours.)

The authority thus conferred is authority to reduce the rate of interest on "all debts" and not on one of many debts.

It is unreasonable to suppose that it was intended

that the Court might discriminate between creditors in the matter of reducing interest.

### DISSENTING OPINION IN LOWER COURT

It should be noted that the dissenting opinion in the lower court does not discuss the reason assigned in the majority opinion for declaring the order reducing interest on the Bogart claim invalid. The dissenting opinion is confined solely to the contention that to construe the statute as authorizing a reduction in the rate of interest, under the circumstances of this case, would render the same unconstitutional, which the majority of the court did not consider.

### TO CONSTRUE THE STATUTE AS AUTHORIZING THE ORDER IN QUESTION WOULD RENDER THE SAME UNCONSTITUTIONAL.

The Bogart claim was approved and allowed for $150,000, with interest at 6% per annum, the contract rate. By the proposal, the petitioner agreed to pay this interest and it is admitted that the property securing the payment of the claim is worth several times the amount of the claim. The petitioner acquired the property subject to the mortgages, without agreeing to pay the indebtedness. The claim, therefore, was solely against the property.

A secured creditor has the same right to interest as he has to the principal of his claim, where the security is ample.

In the case of *Ticonic National Bank v. Sprague*, 303 U. S. 406, 82 L. Ed. 926, this court said:

"This Court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy" (Citing *Coder v. Arts*, 213 U. S. 223, 245, 53 L. Ed. 772, 782).

See also:

*Mortgage Loan Co. v. Livingston*, 45 Fed. (2d) 28;

*In re Hagin*, 21 Fed. (2d) 433;

*San Antonio L. & T. Co. v. Booth*, 2 Fed. (2d) 590.

In foot note No. 31 to the case of *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. Ed. 1593, in which the original Frazier-Lemke Act was held unconstitutional, it is said:

"Counsel for the debtor suggests that the reasonable rental provided for in paragraph 7 is more than the secured creditor ordinarily receives in bankruptcy, since interest on secured as well as unsecured claims ceases with the filing of the petition. But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. *Sexton v. Dreyfus*, 219 U. S. 339, 55 L. Ed. 244, 31 S. Ct. 256, 25 Am. Bankr. Rep. 363. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens." (Citing *Coder v. Arts*, 213 U. S. 223, and other cases).

In the case of *Bartels v. John Hancock Mutual Life Insurance Co.*, 100 Fed. (2d) 813, which involved a

consideration of the Frazier-Lemke Act, as amended, the court said:

> "But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated."

In the same case, 308 U. S. 180, 84 L. Ed. 176, this court said:

> "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, *the priorities and liens of secured creditors being preserved.*" (Italics ours).

It was because the Frazier-Lemke Act, as originally enacted, authorized the taking of the property of the mortgagee, in violation of the Fifth Amendment to the Federal Constitution, that the statute was declared unconstitutional.

> *Louisville Joint Stock Land Bank v. Wm. W. Radford*, 295 U. S. 555, 79 L. Ed. 1593.

It appeared in that case that Radford had mortgaged his farm to the Louisville Joint Stock Land Bank long prior to the enactment of the Frazier-Lemke Act. In the opinion in the case this court said:

> "No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.
>
> This right of the mortgagee to insist upon full

payment before giving up his security has been deemed of the essence of a mortgage."

This court further said:

"It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. * * * * * Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.

Fourth. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare *Mitchell v. Clark*, 110 U. S. 633, 643, 28 L. Ed. 279, 282, 4 S. Ct. 170, 312. But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the State."

This court then discusses the law of Kentucky

and, referring to the Frazier-Lemke Act, said:

> "As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky:
>
> 1. The right to retain the lien until the indebtedness thereby secured is paid."

In the case of *Wright v. Mountain Trust Bank*, 300 U. S. 440, 81 L. Ed. 736, in which this court had under consideration the Frazier-Lemke Act as amended, it is said:

> "It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the provisions in paragraph 1, that the debtor's possession, 'under the supervision and control of the court', shall be 'subject to all existing mortgages, liens, pledges, or encumbrances', and that:
>
> 'All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear'."

In the case of *Wright v. Union Central Life Insur. Co.*, 311 U. S. 273, 85 L. Ed. 184, in discussing Section 75 of the Bankruptcy Act, the court said:

> "Safe-guards were provided to protect the rights of secured creditors throughout the proceedings to the extent of the value of the property."

The court further said:

> "And the creditor will not be deprived of the assurance that the value of the property would be devoted to the payment of its claim."

As the property mortgaged is ample security for the payment of the mortgage debt, interest is collectible at the contract rate to the time of payment of the indebtedness, and is secured by the lien of the mortgage the same as the principal of the debt.

Bogart, by virtue of the lien of his mortgages, is the owner of an interest in the mortgaged property equal to the principal and interest of his claim, and, as the value of the mortgaged property is greatly in excess of his claim, the effect of the reduction of the interest is to take his property to the extent of the difference between the contract rate of interest and the reduced rate and give it to the debtor or the unsecured creditors, in violation of the Fifth Amendment to the Federal Constitution.

**CONSTRUCTION OF SUBDIVISION (k)**

Reading Subdivision (k) in the light of the decisions of this Court hereinbefore cited, in which it was decided that where the property mortgaged is ample security for the payment of the mortgage debt, the right of the mortgagor to the payment of his debt in full is a right protected by the Fifth Amendment to the Federal Constitution, the concluding words that "nothing herein contained shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured" can only apply to a secured debt where the

security is insufficient and the creditor is entitled to participate with the unsecured creditors, as in the case of *Sexton v. Dreyfus,* 219 U. S. 339, 55 L. Ed. 244. Such a construction harmonizes these words with the express declaration "that such extension and/or composition shall not reduce the amount of, or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time the extension and/or composition is accepted".

To construe the concluding words of Subdivision (k) as authorizing the Court to reduce the rate of interest, where the debt does not exceed "the fair and reasonable market value of the property", and the debtor is not personally liable would clearly render the statute unconstitutional in view of the decision in the Louisville Joint Stock Land Bank case, 295 U. S. 555, 79 L. Ed. 1593.

**PROPOSAL OF PETITIONER (DEBTOR) WAS FOR AN EXTENSION AND NOT FOR A COMPOSITION.**

In the proposal of the debtor (Record p. 2) it is stated:

"Debtor proposes to pay all creditors in full."

It is further stated that the unpaid balances on the claims of the secured creditors "to bear interest at the existing contract rate". (R. p. 3).

This is not a proposal for composition but a proposal for extension. The proposal was for an extension of time to pay all creditors in full. The distinction between a composition and an extension

proposal is discussed in the case of *Heldstab v. Equitable Life Assurance Society*, 91 Fed. (2d) 655. The court in the opinion in that case said:

> "Composition by creditors with their debtor in bankruptcy is an agreement between them that the latter will pay down and the former will accept a named per cent of their claims in full satisfaction. * * * *An extension proposal is an agreement on the part of the creditors* that they will extend the time within which their claims *are probably to be paid, in full, as to secured creditors on the terms proposed by the debtor and approved by the court.*" (Italics ours).

Petitioner refers to Subdivision (1) of Section 75 of the Bankruptcy Act as authorizing the order in question. This Subdivision recognizes the distinction between an extension proposal and a composition proposal and provides that the court may "modify the terms of the extension proposal".

Considering the distinction between a composition proposal and an extension proposal, we submit that the authority granted by Subdivision 1 "to modify the terms of the extension proposal" does not authorize the Court to substitute for the extension proposal a composition proposal which would be the effect of permitting the debtor to discharge his property from the lien of the mortgages securing the Bogart claim, by paying less than the amount agreed to be paid.

**CASE OF COHAN V. ELDER, 112 FED. (2d) 967.**

Petitioner, as one of the reasons relied upon for

the allowance of the writ, says that the Circuit Court of Appeals "Has held both ways on identical questions", citing the case of *Cohan v. Elder* (pp. 7 & 8 of Petition).

In the majority opinion of the lower court, (129 Fed. (2d) 774) referring to the case of *Cohan v. Elder*, in a foot note it is stated:

> "The proposal there made by the debtor for the reduction of interest affected all creditors alike."

It is further stated that:

> "Doubts suggested here were not urged or considered" in that case, having reference to the constitutional question.

* * * * * * * * *

The petition should be denied.

Respectfully submitted,

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